

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HAROLD PERKINS, III,) Case No. SA CV 08-993 PJW

Plaintiff,) MEMORANDUM OPINION AND ORDER

v.)

MICHAEL J. ASTRUE,)
Commissioner of the)
Social Security Administration,)

Defendant.)

Before the Court is Plaintiff's appeal of a decision by Defendant Social Security Administration ("the Agency"), denying his applications for Supplemental Security Income ("SSI") and Disability Insurance Benefits ("DIB"). Because the Agency's decision is not supported by substantial evidence, it is reversed and the case is remanded.

On June 24, 2005, Plaintiff applied for SSI and DIB. (Administrative Record ("AR") 74.) The Agency denied the applications initially and on reconsideration. (AR 56-60, 62-66.) Plaintiff then requested and was granted a hearing before an Administrative Law Judge ("ALJ"). On September 27, 2007, Plaintiff appeared with counsel at the administrative hearing and testified. (AR 225-39.) On January

1 16, 2008, the ALJ issued a decision denying benefits. (AR 17-27.)
2 Plaintiff appealed the ALJ's decision to the Appeals Council, which
3 granted his request for review. (AR 10-15.) On July 23, 2008, the
4 Appeals Council issued its decision, denying Plaintiff's claims. (AR
5 3-9.) He then commenced this action.

6 Plaintiff claims that the ALJ erred by: 1) failing to develop the
7 record regarding Plaintiff's mental impairment; 2) misrepresenting the
8 medical record; 3) failing to consider the severity of Plaintiff's
9 mental impairment; 4) failing to obtain vocational expert testimony on
10 the effect of Plaintiff's non-exertional limitations; and 5) improp-
11 erly rejecting Plaintiff's testimony.¹ (Joint Stip. at 3.) For the
12 following reasons, the Court concludes that the ALJ erred in failing
13 to develop the record and that the matter must be remanded for that
14 purpose.²

15 In his first claim of error, Plaintiff contends that the ALJ
16 failed to properly develop the record by obtaining a consultative
17 psychiatric examination. (Joint Stip. at 3-4.) As explained below,
18 though the Court finds this to be a very close call, and lays the
19 blame for the deficient record primarily at the feet of Plaintiff's
20 counsel, the Court agrees that remand for further proceedings is
21 warranted.

22 Plaintiff did not allege that he suffered from a mental
23 impairment in July 2008, when he filled out and submitted a disability
24

25 ¹ The Court has separated Plaintiff's first issue into two.
26

27 ² Although the Appeals Council's decision is the "final
28 decision" of the Agency, it adopted the ALJ's findings with respect to
the issues raised in this court. Thus, the Court will focus on the
ALJ's decision.

1 report and a daily activities questionnaire in support of his
2 applications. (AR 83, 112-14.) In an undated disability report he
3 submitted subsequently, however, Plaintiff stated that "[m]y illness
4 won't allow me to work because [of] the voices in my head and it's
5 hard for me to sleep. I don't get proper rest and my body is
6 drained." (AR 119.) In another disability report, dated March 30,
7 2006, Plaintiff stated that he had been hearing voices "on and off"
8 since February 22, 2002, and that these voices prevented him from
9 sleeping or resting. (AR 140, 142, 149, 151.)

10 On December 13, 2006, while incarcerated, Plaintiff complained of
11 auditory hallucinations and was examined by someone from the Orange
12 County Health Care Agency Correctional Mental Health Services. (AR
13 193.) This person, whose name is illegible on the chart note,
14 reported that Plaintiff's speech was clear and his thought content was
15 "organized," but that he was a poor historian and that his judgment
16 and insight were poor. (AR 193.) Plaintiff claimed that a voice told
17 him "not go to probation." (AR 193.) He also claimed that he had
18 received psychiatric treatment in the past, but was unable to provide
19 any details about the treatment. (AR 193.) The record contains no
20 other evidence of mental health treatment.

21 At the administrative hearing on September 27, 2007, Plaintiff
22 testified that he was depressed "a lot" and that his depression was
23 "severe." (AR 232.) He also testified that he sometimes had memory
24 problems, had difficulty concentrating, had nightmares, and sometimes
25 saw and heard things that were not there. (AR 232-33.) Plaintiff
26 testified that he had gone to a psychiatrist or psychologist for a
27 year in 2006. (AR 237-38.) He conceded, however, that he did not
28 take prescription medication, had not been hospitalized overnight

1 since 1998, and was not seeing a doctor at the time of the admini-
2 strative hearing. (AR 234, 235.)

3 In his decision, the ALJ noted that "the record contains no
4 evidence of treatment for any mental impairment. Apart from the one
5 time when [Plaintiff] alleged mental problems while he was in jail,
6 there is no evidence that [Plaintiff] ever sought treatment for, or
7 mentioned having problems with, any mental impairment." (AR 27.)
8 With respect to the examination while Plaintiff was in jail, the ALJ
9 noted that the examination "revealed organized thought processes and
10 orientation in three spheres. [Plaintiff] indicated that he had been
11 treated with psychotropic medication in the past, but he was unable to
12 name the medication or the name of the clinic or treating physician."
13 (AR 25-26.) After finding that Plaintiff's statements regarding his
14 symptoms were not credible, the ALJ concluded that Plaintiff's
15 impairments were not severe and, therefore, he was not disabled. (AR
16 27.)

17 Plaintiff contends that the ALJ had a duty to develop the record
18 by ordering a psychiatric examination to determine the severity of his
19 mental impairment. (Joint Stip. at 4.) The Agency counters that
20 Plaintiff had the burden of producing medical evidence to establish
21 that he had a mental impairment and he failed to do so. The Court
22 finds that both are right. Plaintiff had a duty to develop the record
23 and he failed. See 20 C.F.R. §§ 404.1512(c), 416.912(c). And the ALJ
24 had a corresponding duty to develop the record and he failed, too.
25 See *Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001) (quoting
26 *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996)) (noting ALJ has
27 an "independent duty to fully and fairly develop the record and to
28 assure that the claimant's interests are considered," even when the

1 claimant is represented by counsel). Thus, the Court is left to
2 resolve this case based on an inadequate record for which both parties
3 are partly responsible. Though the Court concedes that this is a very
4 close case because of the almost total lack of evidence supporting
5 Plaintiff's claimed psychiatric impairment, for the reasons explained
6 in detail below, it sides with Plaintiff and orders that the case be
7 remanded so both Plaintiff and the ALJ can further develop the record.

8 "Ambiguous evidence, or the ALJ's own finding that the record is
9 inadequate to allow for proper evaluation of the evidence, triggers
10 the ALJ's duty to 'conduct an appropriate inquiry.'" *Id.* Where the
11 claimant may be mentally ill, the ALJ's duty to develop the record is
12 "heightened." *Id.* (citing *Higbee v. Sullivan*, 975 F.2d 558, 562 (9th
13 Cir. 1992)); see also 20 C.F.R. §§ 404.1512(e) and 416.912(e).³
14 Indeed, the governing statute provides that, "in any case where there
15 is evidence which indicates the existence of a mental impairment, [a
16 determination that the claimant is not disabled] shall be made only if
17 [the ALJ] has made every reasonable effort to ensure that a qualified

³ The regulations provide:

When the evidence we receive from your treating physician or psychologist or other medical source is inadequate for us to determine whether you are disabled, we will need additional information to reach a determination of a decision ... (1) ... We will seek additional evidence or clarification from your medical source when the report from your medical source contains a conflict or ambiguity that must be resolved, the report does not contain all the necessary information, or does not appear to be based on medically acceptable clinical and laboratory diagnostic techniques.

28 || 20 C.F.R. §§ 404.1512(e), 416.912(e).

1 psychiatrist or psychologist has completed the medical portion of the
2 case review and any applicable residual functional capacity assess-
3 ment." 42 U.S.C. § 421(h).

4 Here, Plaintiff had alleged on several occasions, including while
5 in jail, that he heard voices, which stopped him from sleeping and
6 getting rest, that he had difficulty concentrating, and that he was
7 depressed. The ALJ rejected Plaintiff's allegations essentially
8 because the record contained no evidence of mental health treatment.
9 (AR 27.) That was not a proper basis for dismissing this claim. The
10 Ninth Circuit has "particularly criticized the use of a lack of
11 treatment to reject mental complaints both because mental illness is
12 notoriously underreported and because 'it is a questionable practice
13 to chastise one with a mental impairment for the exercise of poor
14 judgment in seeking rehabilitation.'" *Regenitter v. Comm'r, Soc. Sec.*
15 *Admin.*, 166 F.3d 1294, 1299-1300 (9th Cir. 1999); *see also Hilliard v.*
16 *Barnhart*, 442 F. Supp. 2d 813, 817 (N.D. Cal. 2006) (remanding for
17 further development of record even though claimant failed to provide
18 objective medical evidence of his psychological impairment because he
19 had "raised a suspicion concerning his alleged cognitive impairment,"
20 and the record evidence was inadequate). In this situation, the Court
21 concludes that the ALJ should have ordered a consultative psychiatric
22 exam to resolve the uncertainty in this case. See 20 C.F.R.
23 § 404.1519a(b). On remand, the ALJ should do so.

24 Having second-guessed the ALJ's efforts in this case, the Court
25 turns now to the real reason why this case was not properly resolved
26 before the Agency: Plaintiff's counsel did a poor job. Counsel knew
27 before the hearing that Plaintiff claimed that he had been placed
28 under psychiatric counseling by a court in Orange County. (AR 153.)

1 Yet, none of these records was produced. Counsel knew, or should have
2 known, that Plaintiff claimed that he had undergone psychiatric
3 treatment for a year in 2006, the year preceding the administrative
4 hearing (AR 237-38), yet counsel did not produce any records regarding
5 that treatment. This, despite the Agency's repeated reminders that
6 counsel could submit more records. (AR 12, 228, 238.) Counsel knew
7 that there was no opinion from a psychiatrist in the record regarding
8 Plaintiff's psychiatric condition. Yet, counsel never requested that
9 the ALJ order a consultative examination.

10 More troublesome, is counsel's failure to make any effort at the
11 administrative hearing to champion Plaintiff's case. Counsel asked no
12 questions during the hearing. He made his appearance at the outset
13 and told the ALJ at the conclusion of the hearing that he had no
14 questions. (AR 225-39.) There were many areas that could have and
15 should have been developed. For instance, the record indicates that
16 Plaintiff lost two of his children, his wife, and his mother. (AR
17 80, 173, 229.) Counsel certainly should have developed the facts
18 surrounding these losses in the administrative hearing, as even a lay
19 person would suspect that losing this many people in one's immediate
20 family could trigger depression or worse. The record also shows that
21 Plaintiff continually mentioned that he could not afford medical care.
22 (AR 152, 173.) In fact, he tried to explain this to the ALJ, but the
23 ALJ cut him off. (AR 234.) This inability to pay for medical care
24 might have provided a sufficient explanation for the obvious lack of
25 medical records supporting Plaintiff's case. Yet, Plaintiff's counsel
26 never questioned Plaintiff at the hearing to allow him to explain that
27 he could not afford to pay for medical care.

28

1 There were many other areas counsel could have developed in an
2 effort to further Plaintiff's cause. But counsel did nothing before,
3 during, or after the hearing to bolster Plaintiff's case. There is
4 absolutely no way that seasoned counsel could look at the record in
5 this case and think that Plaintiff had carried his burden of
6 establishing that he suffered from a psychiatric impairment. The
7 Court finds this particularly troublesome for a lawyer from a firm
8 that makes its living doing social security cases and routinely
9 submits fee applications to this court for fees in excess of \$500 an
10 hour, sometimes in excess of \$1,00 per hour, for his work.

11 On remand, Plaintiff's counsel is ordered to locate all
12 outstanding records and submit them to the ALJ for his consideration,
13 including any court orders placing Plaintiff in mental health
14 counseling, psychiatric treatment records stemming from Plaintiff's
15 2006 psychiatric treatment (or any other treatment), and any other
16 records that exist that might support Plaintiff's claim that he
17 suffers from a psychiatric impairment. Further, in any subsequent
18 administrative hearing, counsel should insure that Plaintiff's story
19 is told on the record so as to allow him at least a fighting chance of
20 obtaining benefits.

21 Plaintiff's remaining claims--that the ALJ misrepresented the
22 record, failed to properly consider the extent of Plaintiff's mental
23 impairment, failed to obtain vocational expert testimony, and
24 improperly rejected Plaintiff's credibility--all hinge on development
25 of the record on remand. After obtaining a consultative psychiatric
26 evaluation and any new records, the ALJ should hold another
27 administrative hearing and address these other claims as he sees fit.

28

1 For these reasons, the Agency's decision is reversed and the case
2 is remanded for further proceedings consistent with this Memorandum
3 Opinion and Order.

4 IT IS SO ORDERED.

5 DATED: December 22, 2009.

6 
7 PATRICK J. WALSH
8 UNITED STATES MAGISTRATE JUDGE